No. 452.

MAR 13 1900
JAMES H. McKENNEY,
Clerk

SEARS

Filed Mar. 13, 1900.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

BESSIE SEARS, as Executrix of the Last Will and Testament of STEPHEN P. SEARS, deceased,

Defendant in Error.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. In Error to the Circuit Court for the District of Washington, Northern Division.

BRIEF OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
Of Counsel.

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Petitioner & Plaintiff in Error,

vs.

BESSIE SEARS, as Executrix of the Last Will and Testament of STEPHEN P. SEARS, deceased,
Respondent & Defendant in Error.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. In error to the Circuit Court for the District of Washington, Northern Division.

Brief of the Mutual Life Insurance Company of New York, Plaintiff in Error.

Preliminary Statement.

There is no difference between this case and the Phinney case so far as the Acts of 1877 and 1892 are concerned, but the

questions of waiver abandonment and estoppel arise upon demurrer on the facts admitted, and in addition the effect of the Act of 1897, and the express limitation therein to post-office addresses within the State of New York, and the effect of the one year bar therein are involved herein.

I.

Statement of Proceedings in Court Below.

This action was commenced in the United States Circuit Court for the District of Washington, Northern Division, on the 28th day of September, 1898, to recover the sum of Ten thousand dollars ($10,000) with interest from June 23d, 1898, claimed to be due on a policy of life insurance issued by The Mutual Life Insurance Company of New York (Rec., 1, 9).

The answer was demurred to by the plaintiff and the Court sustained the demurrer to the answer and ordered judgment for the plaintiff, Sears, in the sum of Seven thousand seven hundred and forty-eight dollars and ninety-four cents ($7,748.94) (Rec., 22).

The defendant excepted to the judgment. (Record, p. 23).

No opinion was rendered by Hanford, J., in sustaining the demurrer and ordering judgment.

To reverse this judgment the defendant company sued out a writ of error to the United States Circuit Court of Appeals for the Ninth District, and the judgment was there affirmed.

For opinion of Circuit Court of Appeals by Hawley,

District Judge, concurred in by Gilbert and Ross, Judges, see Record, page 45. Also reported in 97 Federal Reporter, page 986. This opinion says little more than that the case is governed by the decision in the Hill case.

In November, 1899, a petition for a writ of *cetiorari* was filed by the defendant Company in this Court, with a certified copy of the record and brief. This petition and brief were submitted to this Court with brief for Sears opposing application for *certiorari*. (See papers on file.)

Writ of *cetiorari* was thereafter granted by this Court February 5th, 1900, and filed.

This cause now comes before this Court on a writ of *certiorari* for hearing on the merits.

II.

Abstract of Pleadings.

The Complaint.

The complaint in this action alleges that Sears was a resident and citizen of the State of Washington.

That on the 18th day of May, 1891, the defendant company executed and delivered in the City of New York the policy in question, and that the application for said policy contained an agreement and condition that the application was made subject to the charter of the Company and the laws of New York.

That on March 30th, 1898, Sears died in the State of Washington.

That during the lifetime of Sears he duly performed all the conditions of the contract.

The following clause appeared in the policy attached to the complaint :

PAYMENT OF PREMIUMS.—Each premium is due and payable at The Home Office of the Company in the City of New York ; but will be accepted elsewhere when duly paid in exchange for the Company's receipt, signed by the President and Secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. That part of the year's premium, if any, which it is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the Company except as hereafter in provided.

That the plaintiff as Executrix had duly complied with all the conditions of the contract necessary to be complied with.

The complaint was sworn to the 19th day of September, 1898.

The Answer.

The plaintiff in error answering admits the issuance of the policy but denies that the contract was made or delivered in the City or State of New York, and further denies that all the conditions of the contract were performed, and alleges affirmatively.

1st. That the application was made in the State of Washington and the policy delivered in the State of Washington, and the first annual premium of $491 paid thereon in the State of Washington, by Sears.

2nd. That the premiums due on the 18th days of May, 1892, 1893, 1894, 1895, 1896 and 1897 had not been paid, that the policy by its terms had therefore become forfeited. (Record, 15.)

Third.—That subsequent to May 18th, 1893, and when the second premium was not paid, Sears with full information of the lapsing of the policy refused to pay the premium in default and thereby restore the policy after such default, elected to have the same terminated and that the defendant relying on such election of Sears at all times treated the policy as lapsed, and relying upon Sears conduct abstained from taking any further steps in regard to said policy by way of notice or otherwise. (Record, p. 18).

The Demurrer.

The plaintiff demurred to the first and second affirmative defenses and to the answer generally on the ground that the same did not state facts sufficient to constitute a defense to the complaint (Record 20).

III.

Chronological Statement of Facts Admitted by Pleadings.

1877. Act of 1877 passed.

1891, May 18th. Sears, a resident and citizen of the State of Washington, executed an application at Seattle, Washington, to the defendant company for a policy of insurance on his life, for the sum of $10,000, payable to his executors, administrators and assigns. This application was forwarded to the Home Office, in the city of New York. Pursuant to such application a policy as applied for by Sears was issued, and forwarded from the Home Office in New York to the agent at Seattle who delivered it to Sears upon payment of the first premium.

1892, May 18th. Premium not paid.

1892, Oct. 1st. Law of 1892 went into effect.

1893, May 18th. Sears, with full information of the lapsing of the policy, refused to pay the premiums in default, and thereby restore the policy after such default, elected to have the contract terminated, and the defendant, relying on such election of Sears at all times, treated the policy as lapsed, and, relying upon Sears' conduct, abstained from taking any further steps in regard to said policy by way of notice or otherwise.

1894, May 18th. Premium not paid.

1895, May 18th. Premium not paid.

1896, May 18th. Premium not paid.

1897, April 8th. Law of 1897 went into force.

1897, May 18th. Premium not paid.

1898, March 30th. Sears died in the State of Washington.

1898, Sept. 28th. Suit commenced.

IV.

Statement of the case required by Rule 21.

The following statement presents succinctly the questions involved and the manner in which they are raised.

The first question is, whether the Statutes of New York of 1877 and 1892 applied or not to the business of collecting premiums from non-residents which are not demanded to be paid within the State of New York. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors (See Point I).

The second question is, whether or not under the circumstances the policy was or was not a Washington contract governed and construed by the laws of Washington alone, and not by the Statutes of New York in question.

The question is raised by the sustaining of the demurrer to the answer and the assignment of errors (See Point II).

The third question is, whether if the premium notice statutes of New York applies, their equitable and true construction aids the plaintiff in keeping the policy alive. This question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (See Point III).

The fourth question is, whether or not such premium notice as might be applicable to the Sears policy and the premium due May, 1897, was the Statute of 1897, passed April 8th, 1897. This question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (See Point IV).

The fifth question is, whether or not the Sears policy did not become lapsed and forfeited beyond any question on May 18, 1897, by its terms, by reason of non-payment of the premium falling due on that day, because by the express provision of the Act of 1897, no notice was necessary, as Sear's post-office address was not in the State of New York. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (See Point III).

The sixth question is, whether if any statutory notice was required the sending of notice was not waived by Sears, by the terms of the policy and whether actual knowledge of the due date of the premium possessed and acted upon by him obviated the necessity for statutory notice. The question was raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (See Point VI).

The seventh question is, whether or not the policy in question was not terminated by waiver, estoppel, abandonment and recission and the question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (See Point VII).

The eighth question is, whether or not it is essential to the maintenance of this action that Mrs. Sears should have paid or tendered the premiums before suit and should have pleaded both that fact and the Acts of 1877 and 1892. The question is raised by the sustaining of the demurrer to the answer and the assignment of errors thereon (see Point, VIII).

V.

Statement of questions in issue as presented in the petition for the writ of certiorari.

FIRST.

Whether the statutes of New York of 1877, 1892 and 1897 respectively apply at all to the State of Washington or in any event to this case where the policy was delivered and the first premium paid in the State of Washington.

SECOND.

Whether if the policy was delivered in the State of Washington and there became a binding contract, it was lawful for the parties to provide in it for a waiver of notice of the due date of premiums.

THIRD.

Whether the New York statutes are merely ones of regulation, effective only within the State of New York, or whether they were when in force respectively a part of the

charter of your petitioner, and limited its powers of contracting outside the State of New York, and whether it was competent for the parties in an agreement subsequent to the delivery of the policy to enter into another agreement by which they dispense with the notice prescribed by the New York statutes if the same applied.

FOURTH.

Whether confessed knowledge of the amount of premiums and the date of their payment, and an express refusal on the part of the insured to make payment obviates the necessity of statutory notice, if the same is required.

FIFTH.

Whether the statutes of New York of 1877, 1892 and 1897 respectively, being of a general nature, apply to your petitioner, a corporation created and chartered under a special act of the Legislature of that State.

SIXTH.

Whether the policy of the State of Washington according freedom of contract should be a controlling reason for holding this policy a Washington instead of a New York contract.

SEVENTH.

Whether the failure to give notice of a particular premium maturing under the acts of 1877, 1892 and 1897 respectively will have the effect of keeping the policy alive, notwithstanding all subsequent premiums have been knowingly left unpaid by the insured.

EIGHTH.

Whether even if the statute of 1877 applied at all it did not apply only to the premium due May 18th, 1892, which was paid, and whether the statute of 1892 if it applied at all did not apply only to the premium due dates respectively May 18th, 1893, May 18th, 1894, May 18th, 1895, and May 18th, 1896, and whether the statute of 1897 if this series of statutes applied at all, did not apply to the premium due May 18th, 1897, and whether if the statute of 1897 applied to the premium due May 18th, 1897, there was no obligation to send any notice, because Sears was not a resident of the State of New York.

NINTH.

Whether, although your petitioner failed to give the notice under the Acts of 1877, 1892 and 1897 respectively (if required), and all subsequent premiums due prior to the death of the insured remained unpaid, it would be an unlawful appropriation of your petitioner's property, without consideration, to require your petitioner in case of the death of the insured to pay the policy.

TENTH.

In event it should be held the statutes of New York of 1877, 1892 and 1897 respectively, apply to this case, whether an action can be brought to recover the amount of the policy until payment has been made or tendered of the past due and unpaid premiums.

ELEVENTH.

Whether, in this action, pleading only the policy of in-

surance, and a performance by the insured of its conditions and without pleading the statutes of New York of 1877, 1892 and 1897 respectively, a recovery can be had when plaintiff admits non-payment of all premiums subsequent to the first up to the death of the insured.

TWELFTH.

Whether it is not a fatal departure from law to law for a plaintiff, alleging as his cause of action a policy of insurance and compliance with its terms, and admitting the defense of non-payment of premiums, to recover judgment because defendant has failed to show compliance with the statutes of New York of 1877, 1892 and 1897 respectively (if the same apply) in regard to mailing notice of the due date of premium, notwithstanding said statutes have not been pleaded by either plaintiff or defendant in the case.

THIRTEENTH.

Whether, in this action, the statute of April, 1897 (which declares "no action shall be maintained to recover under a forfeited policy unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof, for which it is claimed thas the forfeiture ensued"), precludes a recovery in this case, the action having been commenced on the 28th day of September, 1898, more than one year from May 18, 1897, the last premium due date before death.

FOURTEENTH.

Whether under the charter of the defendant Company

and the Statutes of the State of Washington and the State of New York and the matters set forth in the record herein there is any liability on the part of the Company.

VI.

Specification of Errors.

The following are the errors assigned by the plaintiff in error, and upon which it relies for the reversal of this cause.

I.

The said Court erred in sustaining the demurrer of the plaintiff and defendant in error to the first affirmative answer and defense of defendant and plaintiff in error (Assignment of Errors, I, Record, p. 24).

II.

The said Court erred in sustaining the demurrer of the plaintiff and defendant in error to the second affirmative defense of the plaintiff and defendant in error (Assignment of Errors, II, Record, p. 24).

III.

The said Court erred in sustaining the demurrer of the plaintiff and defendant in error to the answer of the defendant and plaintiff in error (Assignment of Errors, III, Record, p. 24).

IV.

The said Court erred in granting judgment in favor of plaintiff and defendant in error against defendant company and plaintiff in error for the amount of said judgment, or any sum, because it was manifest upon the issues formed in said cause that said plaintiff and defendant in error was not entitled to judgment (Assignment of errors IV, Record, p. 24).

V.

The said Court erred in not submitting said cause to trial upon the issues formed by the pleadings (Assignment of errors V, Record, p. 25).

POINT I.

The premium notice statutes of New York of 1877 and 1892 never had any application to the Sears' policy, because those statutes did not apply to the business of collecting premiums demanded to be paid outside the State of New York. The contract was not subject to these particular statutes of New York, because by their true construction they had no application.

For argument in support of the above, see Phinney brief, Point II, page 59, and Cohen brief, Point I.

In the Sears case' it is admitted by the demurrers to the answer that the premium paid on the policy was paid in the State of Washington, and that it was only then and there that the policy became operative and a binding contract between the parties; and it is further admitted that the transactions respecting the non-payment of the premium due in May, 1892, and thereafter took place in the State of Washington.

Under the doctrine advanced in the Phinney Brief and the Cohen Brief, Sears was never entitled to any notice; and from this point of view the whole series of premium notice statutes is irrelevant in connection with the Sears' policy.

POINT II.

Under the circumstances surrounding the application, issuance and delivery of the Sears' policy in the State of Washington it was a Washington contract and under the true doctrine of the conflict of laws the New York statutes of 1877 and 1892 were not the law of this contract.

For argument on this point see Phinney Brief, Point III, at page 79; also Cohen Brief, Point II. See also the opinion of the California Court in the case of Rosson *v.* Equitable appended to the Cohen Brief.

POINT III.

But if this Court should hold contrary to our contention in Point I as above, that the statutes of 1877 and 1892 apply to this contract and to the business of collecting premiums outside the State of New York, then it is submitted that the equitable and true construction of the statute so found applicable is that the statutes operated on the first default alone without notice and did not preserve the contract forever on successive defaults, and further that the forfeiture of the premiums already paid was all that was prohibited.

For argument on this point see Point IV in Phinney Brief, page 94, and also Point III in the Cohen Brief.

POINT IV.

Should the Court notwithstanding points I. and II. above hold that the Statutes of 1877 and 1892 governed the business of collecting the Sears' premiums and that the operation of these statutes was not as contended for in Point III above, then

The Premium Notice Statute, if any, applicable to the Sears' policy after April,

1897, was the statute of April 8th, 1897, and the policy became lapsed and forfeited on May 17th, 1897, one year after May 18th, 1896, the date of the last default before the passage of the Act.

(*a.*) The Statute of 1897 is applicable after April 8th, 1897.

(*b.*) The Sears policy became lapsed and forfeited on May 17th, 1897, one year after May 18th, 1896, the date of the last default before the passage of the act.

See Cohen Brief, Point IV, *a* and *b*. In the Cohen Brief we said that the first default was June 11th, 1893, so that no question could possibly arise in that case on the effect of the saving clause in the Act of 1892 referred to by Hanford, J., in the recent Hathaway case. In this case, however, the first default was May 18th, 1892, and the act did not take effect until October 1st, 1892, so that the saving clause may be adverted to by opposing counsel.

The "Saving Clause" in the Act of 1892 has no bearing on the Sears case, because there were defaults in paying premiums subsequent to the passage of that act.

In the Hathaway case the policy was issued January 26th, 1892, no premium was paid January 26th, 1893, or thereafter, and the insured died April 15th, 1898.

When the policy was issued the act of 1877 was in force, and before the second premium was due the act of 1892 went into force.

HANFORD, J., apparently uses the saving clause in the act of 1892 for the purpose of holding that the act of 1877 always applied to the policy, yet he is not very clear on

this point, for he says "that the question to be decided in "the case is whether the amendment of the law of 1892 by "the act of 1897 had the effect to terminate the contract "between the parties immediately, and to bar an action "upon the policy after the death of the insured, which "occurred subsequent to the date of said statute."

The contention of this plaintiff in error is that there is nothing in the saving clause of the act of 1892 which prevents the application of the doctrine of the Rosenplanter case to the Hathaway and Sears cases.

The claim of the Court in the Hathaway case apparently is that the saving clause operates to continue the act of 1877 as applicable to then existing policies.

The "Saving Clause" and "Construction" sections, referred to by Hanford, J., are sections 291 and 292 of Chapter 28 of the General Laws (Being Chap. 690 of the Laws of 1892). They are in full as follows:

> "Sec. 291. SAVING CLAUSE.—The repeal of a law, or any part of it specified in the annexed schedule, shall not affect or impair any act done, or right accruing, accrued or acquired, or penalty, forfeiture or punishment incurred prior to October 1, 1892, under or by virtue of the laws so repealed, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such laws had not been repealed; and all actions or proceedings civil or criminal, commenced under or by virtue of the laws so repealed and pending September 30, 1892, may be prosecuted and defended to final effect in the same manner as they might under the laws then existing, unless it shall be otherwise specially provided by law."
>
> "Sec. 292. CONSTRUCTION.—The provisions of this chapter so far as they are substantially the same as those of laws existing on September 30, 1892, shall be construed as a continuation of such laws, modified or amended, according to the language employed in this

chapter and not as to new enactments, and shall be applicable to all corporations formed under laws repealed by this chapter. References in laws not repealed to provisions of law incorporated into this chapter and repealed, shall be construed as applying to the provisions so incorporated. Nothing in this chapter shall be construed to amend or repeal any provision of the Penal or Criminal Code."

The court will observe that this is not a "Saving Clause" appended to a repeal of the premium notice statute of 1877 alone. That statute is but one of 163 statutes on a vast variety of insurance subjects, all repealed, so that it does not necessarily apply at all to the act of 1877.

Indeed the Commissioner's Report on the Statutory Revision in their note to proposed Section 291 refer specifically to certain insurance statutes of 1853, 1857, 1879 and 1886, and saving clauses in those statutes as the ones codified in § 291.

The Circuit Court of Appeals in the Sixth Circuit in the Rosenplaenter case expressly allude to this Section 291, and say: "Section 291 of this act provides that no right "acquired or accrued, or penalty or forfeiture incurred, "prior to October 1, 1892, should be affected by the repeal "of the laws therefrom in force, but otherwise manifestly "subjects policies then in force to be Act of 1892, in re-"spect of payment of premiums thereafter falling due."

In the Rosenplaenter case the first default was in October, 1891 (when the Act of 1877 was in force), and the last default before death was in April, 1894 (when the Act of 1892 was in force), but the Court held no notice necessary under the Act of 1892, and thus construed the "Saving Clause" as having no effect upon prior defaults, and as *there was subsequent defaults*, this was of course proper.

The facts in the Sears' case are similar. In that case the policy was issued May 18, 1891, and the first default

was in May, 1892 (prior to passage of Act 1892), and Sears died March 30th, 1898. So that, as in the Rosenplaenter case, the "Saving Clause" has no effect upon the prior default, there being *subsequent* defaults controlled by the Acts of 1892 and 1897.

The "Saving Clause" might be effective in a case where there was a prior default and no notice, and then no *subsequent* defaults after the passage of the act of 1892.

For instance, suppose a default without statutory notice in December, 1891, under the Act of 1877, and then a death in November, 1892, after the Act of 1892. To such a case the "Saving Clause" would apply, and in a case where the Act of 1877 was applicable there would be no forfeiture, and the effect of the Act of 1877 would not be gone, although the act was repealed.

If the Act of 1877 applied to the Phinney case then the "Saving Clause" might have operated in that case (barring questions of waiver, abandonment, etc.), for the first default was in 1891, and the second in 1892, before the Act of 1892, and then Phinney died.

The "Saving Clause" has no possible application to the other cases before this Court.

In the Allen case the policy was not issued until 1893.

In the Cohen case there was no default until 1893.

In the Hill case, Hill died in 1890.

POINT V.

If the Sears policy did not become lapsed and forfeited on May 17, 1897, one year after the premium due May 18, 1896, because a year had not yet elapsed from April 8, 1897, yet it became lapsed and forfeited on May 18, 1897, by its terms, for on that day default was made, and by the express provisions of the act no notice was necessary because Sears' post office address was not in the State of New York.

For argument on this see also Cohen brief Point V.

Whether the Act of 1897 be regarded as a new law, or as a simply declaratory of what the pre-existing law was, it is clear that subsequent to the passage of that act, that is subsequent to April 8, 1897, no notice had to be sent to Sears, as he was not a resident of the State of New York.

This act took effect April 8th, 1897, and Sears was alive on May 18th, 1897, when a premium became due and was not paid.

Under the doctrine of the Rosenplaenter Case, 96 Fed. Reporter, 721, whether the law of 1897 was a new law or merely declaratory of the existing law, no notice was required to be sent to Sears, and as he did not pay his premium on that day, the policy was lapsed and forfeited for failure to pay that premium, entirely irrespective of what had occurred previously.

On the theory of the plaintiff, if Sears was sent no notice on May 18th, 1893, and did not pay his premium at that time, his policy was not void and forfeited; but the failure to send a notice could not possibly carry the policy any further than the payment of a premium would have

carried it ; so that on the theory of the plaintiff by successive failures to send notices, even if there were successive failures to pay premiums in 1893, 1894, 1895 and 1896, his policy was carried in force up to May 18th, 1897, but at that time, even on the theory of the plaintiff, the defendant was obliged to send no notice, and if he failed to pay his premium the policy was forfeited and lapsed.

In both the Cohen case and the Sears case a premium became due after April 8, 1897, during the lifetime of the insured ; in the Cohen case on June 11, 1897, and in the Sears on May 18, 1897.

In the Cohen case the first default was June 11, 1893, so that no question could possibly arise in the Cohen case as to the effect of the saving clause in the Act of 1892 referred to by Hanford, J., in the recent Hathaway case. In the Sears case, however, the first default was May 18, 1892, and the act did not take effect until Oct. 1st, 1892, so that the saving clause may be adverted to by opposing counsel and it is discussed in Point II above.

UNDER THE MOST EXTREME VIEW THAT CAN BE TAKEN THE DEFENDANT IN ERROR SEARS CANNOT RECOVER, BECAUSE THE ACTION WAS NOT BROUGHT WITHIN ONE YEAR FROM JULY 18, 1897.

For argument on this point see Cohen brief Point V.

POINT VI.

If the Court holds that the true construction of the statutes of 1877 and 1897 required a notice to be sent Sears unless waived, then it is claimed by the plaintiff in error the sending of any statutory notice was waived by Sears by the express terms of the policy, and that actual knowledge, possessed and acted upon by Sears, obviated the necessity for statutory notice.

For argument on this point, see Point V of Phinney Brief, page 116, and Cohen brief, Point VI.

It is admitted in the case that subsequent to the failure of Sears to make payment of the premium falling due May 18th, 1893, and subsequent to the lapsing of the policy for failure to make payment, and after Sears was fully informed and knew that his policy was lapsed and void, the defendant Insurance Company applied to Sears to make restoration of his policy, by making payment of pemiums in default, and having the policy restored; and it is further admitted that Sears refused to make any such payment and refused any longer to continue the policy or make any further payments on it, and elected to have the policy terminated; and it is further admitted that the Life Insurance Company, relying upon such election and determination of Sears, treated the policy as lapsed, abandoned and terminated, and relying upon Sears' conduct abstained from taking any further action or step in relation to the policy by way of notice or otherwise in order further to effect its cancellation and termination.

POINT VII.

The contract was abandoned by Sears and this he had a right to do so.

For argument on this point see Phinney Brief, Point VI, page 143.

This policy was payable to Sears, executors or administrators. It is admitted that Sears had full information that his policy had become void, and that with this knowledge he was applied to by the defendant to have his policy restored, but that Sears refused to do so, and elected to have his policy terminated, the company relying upon such election, treated the policy as lapsed, and abstained from taking any further steps in regard to it (Rec., p. 18).

The Circuit Court of Appeals says (Rec. 47) that the parties could not waive the provisions of the statute of New York which expressed the conditions upon which the policy might be forfeited for non-payment of premiums. Whatever view the Court may hold as to an express agreement to waive the statute in advance, there can be no question but that after default the parties interested can contract respecting the policy. The doctrine of the Court of Appeals would prevent an agreement surrendering the policy to the company in all cases where no notice had been sent, while the policy would be kept alive and be non-terminable against the will both of the insurance company and the sole party interested, which would be absurd.

In his brief in opposition to the writ of certiorari counsel claims that had Sears paid $246 more (the record shows $491 as payable) he would have been entitled to paid up insurance for $3,000, or a policy for $10,000 extended insurance for nine years. This is incorrect.

Sears was not entitled to any extended insurance under any circumstance. He had paid two years, and he had had his insurance for two years for $10,000.

Counsel also claims that Sears was given no opportunity to pay, and that the company does not pretend it was misled by Sears' conduct, or refrained from sending notice on account of such conduct. The *admitted* facts above referred are just the contrary of these claims.

POINT VIII.

The alleged cause of action was not pleaded and there was a departure. See Phinney brief; Point VII.

POINT IX.

The judgment should be reversed.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
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Of Counsel.

Sup. Ct. Bf. of Davies, Short, Allen & McKenney for Petitioner

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Mar. 20, 1900.

Nos. 452, 453, 454, 455.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR AND PETITIONER,

vs.

COHEN.

SAME *vs.* HILL.

SAME *vs.* SEARS, EXECUTRIX, &c.

SAME *vs.* ALLEN, ADMINISTRATOR, &c.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR AND PETITIONER, FILED BY LEAVE OF COURT.

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JOHN B. ALLEN,
FREDERIC D. McKENNEY,
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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-20-1900

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Supplemental Brief of Plaintiff in Error and Petitioner, Filed by Leave of Court.

Should the court uphold either Point II, III, IV, V, VI, or VII of the brief in the Phinney case (No. 12), the above causes will be disposed of with like result as in that case, except that Point III does not apply to the Hill case, as the application for that policy contained the provision that the contract of insurance when made should be held and con-

strued at all times and places to have been made in the city of New York.

It is desired to add here a few considerations pertinent to these cases and applicable to the above points, and also to present some views on questions arising under the act of 1897 applicable to the Cohen and Sears cases and not fully elaborated in the main Cohen brief.

The following summary is made for the convenience of the court:

Hill Case.

The date of the Hill policy is April 29, 1886; amount, $20,000. The first annual premium was paid upon delivery of policy. The second, third, and fourth annual premiums were not paid. Hill, the insured, died December 4, 1890. The beneficiaries were the wife, if living; if not, such of the children as might be living upon the death of the insured. Suit was commenced October 19, 1895.

Sears Case.

Date of policy, May 18, 1891; amount, $10,000; payable to executors, administrators, or assigns.

The annual premium due May 18, 1892, was paid, but the third, fourth, fifth, sixth, and seventh annual premiums were not paid. Sears, the insured, died March 30, 1898. Suit was commenced September 28, 1898.

Allen Case.

Date of policies (2), February 18, 1893; amount, $2,500 each; payable to executors, administrators, or assigns.

The first annual premium was paid. The second, third, fourth, and fifth were not paid. Stewart, the insured, died July 9, 1897. Suit was commenced December 28, 1897.

Cohen Case.

Policy dated June 10, 1888; amount, semi-endowment of $1,500 to himself if living at the expiration of ten years; in case of death before that time, $3,000 payable to wife, Fine Cohen.

Premiums were paid to June, 1892. All subsequent premiums were not paid. Death occurred September 21, 1897. Suit was commenced November 29, 1898.

POINT I.

The widow of Cohen and the children of Hill, beneficiaries in the respective policies, not having paid or caused the premiums overdue to be paid, are concluded by the conduct, statements, and omissions of the insured.

It is to be remembered that in each of these two cases the insured himself made the application for the insurance; the contract was between him and the company; the premiums, so far as paid, were paid by him alone; to him was delivered the policy, and, for aught in the record to the contrary, in his possession it remained.

Under such state of facts, we think the following conclusions must be accepted:

a. That there was no obligation on the part of the insured to pay premiums longer than he wished, and that the beneficiaries had no power or authority to require the insured to make payment.

b. The insurance company by the contract dealt solely with the insured, and was required to give notice to him alone. If the insured failed or refused to make a payment

at the due dates, or for thirty days after notice had been served, the contract was terminated.

c. The inability of the insured to pay, his refusal or his neglect to pay, operated to terminate the contract.

It is wholly immaterial who the beneficiary may be, whether third person not wife or children, or wife or children, so far as the question of notice is concerned. We are dealing only with the question of statutory notice to the insured. The wife or children, beneficiaries, cannot recover when the premiums have not been paid. It is not a question of the company preventing them from paying or preventing any one in their behalf from paying. The company, under the statute, owed no obligation to *them*. The obligation, if any, was to Cohen and to Hill alone. Such obligation, if any, was destroyed, the company claims, by the acts of the insured. If so, it follows that Cohen and Hill were without excuse for non-performance, and their non-performance had its full effect, namely, cancellation of the policies.

The sole excuse the wife of Cohen or the children of Hill urge for non-payment of premiums is that notice was not served on Cohen or Hill; but this failure to serve notice did not in any way prevent the wife or the children from paying or causing the premiums to be paid. In the case of Wheeler *vs.* The Connecticut Mutual Life Insurance Company, 82 N. Y. Appeals, 543, the policies had been assigned by Vose to his children, for whom he was general guardian. Vose became insane. This was held not to relieve the children.

"Although Vose was their guardian, if incapacitated by "his insanity, a competent person could have been ap- "pointed in his place; and hence his insanity was not "necessarily an insuperable obstacle to their performance "of the condition of the policy, and they were not relieved "thereby" (p. 550).

We submit, the insured stands as principal and is the only person with whom the insurance company had to deal; but if it should be contended that the beneficiaries are the principals and the insured their agent in matters relating to premiums, then the insured's relation to the matter is that of a general agent clothed with full power; and whether the beneficiary is a person of capacity or laboring under incapacity, in claiming the benefits of the policy he must be bound by the conduct and representations of his general agent. If the insured, as general agent, made such representations and was guilty of such conduct as would prelude him from recovering on the expiration of a term policy payable to himself, his beneficiary, whether over or under age, cannot recover upon like policy, for such representations and conduct will bind him also, and this, we think, in the nature of things, must be the universal rule, regardless of the capacity or incapacity of the principal. If a guardian or other person represents the infant beneficiary in asserting a claim to the insurance under such circumstances, he steps in the shoes of the insured.

In Klein *vs.* Insurance Company, 104 U. S., 88, a policy of insurance was issued upon the life of one Frederick W. Klein, payable to his wife, Clara Klein. One of the conditions of the policy was that if the stipulated premium should not be paid on or before a certain day the policy should cease and determine. A semi-annual premium due in March, 1871, was not paid. The wife alleged as a ground of relief that the policy was taken out by Frederick W. Klein without her knowledge; that she had received no information of its terms or conditions until after his death; that about February 1 he was taken down by the illness from which he died, and that on account of his condition he was incapable of attending to any matters of business whatever, and for that reason failed to pay the premium when it was due. The bill was dismissed in the lower court, and on appeal this court affirmed the decree.

Mr. Justice Woods, in the opinion (page 92), states:

"She (the wife) was never incapacitated from making payment. The alleged fact that she had no knowledge of the existence and terms of the policy does not relieve her default. If the fact be true, her ignorance resulted from the neglect of her husband, who, in respect of this contract of insurance, was her agent, in not informing her about the insurance on his life and the term of the policy. The bill is therefore an effort by her to obtain relief in equity against the appellee from the consequence of neglect of her own agent."

Knickerbocker Life Insurance Co. *vs.* Pendleton and others, 112 U. S., 696, was a case where a policy of insurance was issued on the life of one Samuel H. Pendleton for the benefit of the plaintiffs as the children of the said Samuel H. Pendleton. The policy was conditioned to be void if the annual premium, or any obligation given in payment thereof, should not be paid at maturity. The annual premium due in July, 1871, was paid by a foreign bill drawn by the insured, with the condition that the policy should be void if the draft was not paid at maturity. The bill was presented and not accepted on account of want of funds in the hands of the drawee.

In the opinion, at page 708, Mr. Justice Bradley says:

"The drawer (Pendleton) who took entire charge of the policy for his children, put its existence on the condition of the payment of the draft at maturity; and it was his business, as agent or guardian of his children, to see that the draft was thus paid, that the requisite funds were in the hands of the drawee, or that they would pay it, whether in funds or not."

In Miles *vs.* Connecticut Life Ins. Co., 147 U. S., 177, the insurance company issued a policy for $5,000 upon the life of John S. Miles for the sole use and benefit of Sarah G. Miles, his wife. It was at the instance of the insured that the policy was issued, and he paid with his own money all of

the premiums. Before the tenth premium became due the insured advised the company that he could not pay that premium and wished a paid-up policy. The company advised him not to do so, but to have so much of the $5,000 released as would enable him, with the sum allowed for such release, to pay what would be due as a premium on the remainder. This was agreed to, and a receipt was presented by him, signed by his wife, for $82.39, as a consideration for the release of $700 of the $5,000, the $82.39 being applied towards a premium on the $4,300. Thereupon the husband received a policy for $4,300 on his own life for his wife's benefit. Subsequently he took a paid-up policy for $1,195 in the same favor, having given what purported to be a receipt signed by the wife. It appears that the wife's name on both receipts was signed by the husband without her assent. In suit on the $5,000 policy brought by the wife, the company set up non-payment of premium.

The court held that it was a good defense, and that there was nothing to justify the failure to pay the premium.

In Schneider *vs.* U. S. Life Insurance Co., 123 N. Y., 109, the court held that a married woman in whose favor a policy of insurance was issued upon the life of her husband could not claim the benefit of the insurance without at the same time assuming all the responsibility of a failure to perform its essential conditions, among them being the payment of premiums.

In the opinion of O'Brien, J., at page 114, it is stated:

"The husband had the possession of the policy, and in dealing with the defendant in regard to it was treated as plaintiff's agent, and the rule that when one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one whose act enabled the fraud to be committed, applies to this case."

See also Manhattan Life Ins. Co. *vs.* Smith, 44 Ohio State, 156.

In Baker *vs.* The Union Mutual Life Ins. Co., 43 N. Y. Appeals, 283, the court says:

"The case will not be changed if the policy is regarded as having been procured by the plaintiff, and as the result of an agreement made between her and the defendants. The husband of the plaintiff was the actor in the transaction, and represented the plaintiff; and claiming the benefit of his acts and of the policy procured by his agency, she necessarily ratifies and affirms the contract as it was made, with all its terms and conditions. She adopts the acts of the agent and makes them her own (Elwell *vs.* Chamberlain, 31 N. Y., 611: Bennett *vs.* Judson, 21 *id.*, 238). If the agent exceeds or transgresses his authority, the principal may repudiate his acts altogether, but cannot affirm in part and repudiate in part, take the benefit of the favorable parts of a contract and reject the residue."

In Whitehead *et al. vs.* New York Life Ins. Co, 102 N.Y., 143, a husband procured a policy of life insurance upon his own life for the benefit of his wife, or, in case of her death before his, of their children. *Held*, that the husband had no authority without the assent of the assured to surrender the policy, such an act not being within the scope of the agency inferable from the taking out of the policy by him; but where such a policy by its terms has become forfeited for failure to pay premiums, the husband may thereafter, in consideration of a sum paid, surrender it. In such case the forfeiture is not waived by the surrender, and the assured could not repudiate the surrender and at the same time assert the revival of the policy under it.

Finch, J. (p. 150):

"He (the insured), therefore, in procuring the policies to be made, in paying the premiums, in receiving and acting upon notices and in doing whatever was necessary to perfect and continue the rights of the assured, must stand in the attitude of an agent, acting and representing the assured, and as having no interest in the policies, unless, possibly, after the death of all of the assured."

Holmes *vs.* Gilman, 138 N. Y., 369, 381, 382, is to like effect.

In Mechem on Agency, section 775, the author states the rule as follows:

"Hence it is a rule of universal application, whether the principal be disclosed or not at the time of entering into the contract, that the principal is affected by, and is subject to, every defense which the other party may have, based upon such fraud, imposition, misrepresentation, concealment or other misconduct of the agent as is, either by a prior authorization or a subsequent ratification, properly chargeable to the principal as having been done or committed by the agent within the scope of his authority, although the principal himself may have been entirely innocent."

POINT II.

The answers in all of these cases set up facts which estop the insured and all others interested from recovering upon the policies.

Each of these answers sets up acts on the part of the insured indicating an intention to abandon the policy of insurance, with the practical result of rescission. Each of these answers sets up statements on the part of the insured by which he refused to pay the premiums, and also the fact that subsequent to such refusal the insured did not pay the premiums for a number of years prior to his death. It is obvious that with respect to any one of the annual premiums remaining unpaid the insurance company might have sent the notice provided for in the statute and forever have put an end to the possibility of a claim that the policy was a subsisting contract. Not sending these notices was conduct prejudicial to the interests of the insurance company, which consists of living members or policy-holders who faithfully perform their part and duly

and punctually pay their premiums. Refraining from sending the notices was, as is pleaded in all of these cases, induced by the conduct and acts of the insured, and, as is also pleaded, the company in not sending the notices relied upon the conduct of the insured in refusing to pay his premiums and in not paying his premiums. Whether the facts be looked upon as creating an agreement to abandon or rescind for a sufficient consideration, to wit, the detriment to the company, or as creating an estoppel, a defense is equally well made out by the company in each of these cases.

The policies in the Cohen and Hill cases not being payable solely to the insured, but also to wife or children, are nevertheless to be successfully defended against on the ground of estoppel.

In the Cohen case the widow sues because, although it is an endowment policy payable to Cohen himself in 1905, it became payable to his widow upon his death occurring prior to that date. No added difficulty arises from the fact that these two policies are payable to other persons than the insured as beneficiaries. It is well settled, as shown in Point I, that in all matters connected with the making of the application and the taking out of a policy the insured acts as the agent of the beneficiary, who is bound by the statements and the conduct of the insured. Similarly, for all matters connected with the payment of the premium and the receipt of any notice with respect thereto, the insured must be considered the general agent of the beneficiary. The insured is the person who determines how and when the premium is payable and who is expected to pay the premium and who actually does pay the premium. The scheme of the contract makes no provision for payment of the premium by anybody but the insured. The statutes with regard to the sending of premium notices relate primarily to the sending of notices to the insured—not to the beneficiary.

It has been held that the insured is under no duty to the beneficiary to pay the premiums and keep them up. Remembering that the statute contains no provision for sending notice to the beneficiary and confers no right of forfeiture upon the company if the notice be sent to the beneficiary, it seems clear that in all matters connected with that notice the insured must be regarded as the representative and agent of the beneficiary. The statute is designed not to jog the memory of the beneficiary, not to guard against the negligence or want of business promptness and attention of the beneficiary, but to deal in these matters simply with the insured. When the insured, as in these cases, refuses to pay a premium, elects and makes known his election to the company to have the policy lapse and forfeited, and subsequently for many years does not pay any premiums, the company is lulled into security and the belief that the insured has abandoned the policy, and that the sending of notices is unnecessary and would merely call attention to an act which the insured had long since determined he would not perform.

POINT III.

The time limited in the premium-notice statutes for sending the prescribed notices clearly indicates that such notices were required to be sent only to persons having addresses within the boundaries of the State of New York.

The necessary limitation of the scope and effect of the premium-notice laws to the geographical boundaries of the State of New York is shown by the circumstance that the length of time provided in these statutes for the giving of notice to the insured precludes the possibility that the legislature could have contemplated that these notices would be

sent to others than those who were to receive their mail-matter within the limits of the State of New York. All of these statutes make such provision with regard to the mailing of the notice that the insured will always suffer forfeiture of his policy at least at the end of thirty days from the date of the mailing of the notice. Thirty days is the obligatory limit of statutory forewarning. In view of the circumstance that long prior to 1876 insurance companies of the State of New York had been transacting business not merely in the most remote portions of the United States, but also in foreign countries, it is obvious that there would be many insured in these companies whose distance from the home office would be such that it would be physically impossible for a notice to be mailed and received by them in time for the insured to make remittance of the premium and save a forfeiture. It must be considered that the legislature had this information in its possession when the acts were passed. The logical conclusion is that the legislature could not have intended to require that the notice be sent to those who had post-office addresses outside of the State of New York, because in many instances the sending of such notices would be productive of no useful or practical result. The declaratory act of 1897, expressly limiting the mailing of notices to those having post office addresses within the State of New York, proves that this view is the correct view, and the argument on page 17 of the Cohen brief on this point is thus rendered conclusive.

It was not intended that the statutory notice should be mailed to persons outside the State of New York. The statute is one of public policy, external to the contract. By agreement of the parties it cannot be drawn into the contract nor excluded from it. It presupposes a contract between the parties such as they see fit to make. It in no manner limits their contracting rights. It is not a statute of contract or a contract obligation. It comes by way of relief, after a contract has been made and after it has been

violated, to afford protection, in the interest of the public, to a certain class of persons against the consequences resulting from such violation of contract, or rather, as a matter of public policy, it prevents one of the parties to the contract from making defense of the violation of the contract by the other party. It shuts the doors of the courts of New York against the insurance company in making defense of non-payment of premium according to the stipulation of the contract. The original statute, being enacted in 1876 with the object of protecting insured persons against their own negligence and improvidence, provided a time of notice that must have been deemed adequate to accomplish the purpose the legislature had in mind, which was to remind the neglectful policy-holder of the due date of his premium, and after bringing him information upon the subject, of also affording him the opportunity of making payment at the home office of the company in the State of New York. Such a notice, if confined to the State of New York, would accomplish the purpose the legislature had in mind. If at the time of enactment of the law it extended indefinitely beyond that State, it was of little or no value to the policy-holder. The construction of this public-policy statute for which we contend is, that the notice was to be mailed to persons in the State of New York. If this is not the correct construction, then the legislature intended to reach out, with a thirty-days' notice, to the limit of mail communication, whether upon this continent or wheresoever treaty arrangements extended the mail facilities of the United States. The fact that the affidavit of an agent or employé of the insurance company is by the statute made *prima facie* evidence of the mailing of the notice furnishes another strong reason for the contention that the notice applied only within the State. Such rule of evidence could not be established for courts of other States and jurisdictions.

POINT IV.

All questions arising under the act of 1897 are open to discussion in this court.

The case arose in the court of first instance upon a general demurrer. Notwithstanding that neither the complaint nor the answer referred to any of the premium-notice acts, the United States court was competent to take judicial notice of these public statutes. Every question arising, therefore, on any of the premium-notice statutes was open to discussion in the court below, assuming that the omission from the pleadings did not result in leaving the original plaintiff with the cause of action defectively pleaded. On the appeal to the circuit court of appeals and in this court the only assignment of errors necessary was a general statement that the court erred in giving judgment for the original plaintiff upon the demurrer to the answer. The records of such cases as these necessarily fail to show, and it is not necessary that they should show, what questions were *discussed* in the court of first instance or at the circuit court of appeals. Where a cause is presented upon a general demurrer, the record cannot show what questions were *discussed*, and it therefore must be assumed that every question that could have been discussed was taken up, and no such question can be excluded from the consideration of any court at any stage of the case. The defendants in error cannot prove to this court, either by assertions of counsel, or by briefs of opposing counsel filed in the court below, or by the opinions of the court, what the questions were that were discussed or omitted in either of the lower courts. This court has repeatedly held that the record, and that alone, can be appealed to for such purposes, and that briefs of counsel and opinions of the courts form no part of the record. Counsel are not prohibited from discussing

orally propositions that are not set forth in their briefs, nor are courts presumed to be uninfluenced in their decisions by questions proper in the case which may not be taken up for discussion in the prevailing opinion.

The rule that requires the court to take judicial notice of the statutes of New York of 1877 and 1892 equally applies to that of 1897. Counsel cannot preclude this tribunal from applying a general statute of which it must take judicial notice to the case under review.

POINT V.

The legislature of the State of New York, with respect to existing policies, had power under the act of 1897 to withdraw the provision with respect to notice, to fix a period of time after which, with or without notice, the company could declare a forfeiture, and to provide that action should not be brought within a year from a default in the payment of premiums.

A.

The original act of 1876 was held to affect prior existing policies. This was never questioned by counsel or by the courts, notwithstanding it placed upon the companies an obstruction to the exercise of their contract right to forfeit existing policies for non-payment of premiums upon the due date.

B.

The provisions of the contracts affected and of the premium-notice statutes establish the proposition that these laws are a governmental regulation and do not form part of the contract, so as to confer any vested right upon the

holder of a policy made subsequent to the enactment of any of them; nor does the act of 1897 impair the obligation of any contract of the holder of a prior existing policy. None of these statutes prescribes the form of the contract or prohibits the agreement which is entered upon by all of these policies in question by which, upon failure to pay the premium upon the due date, the policy-holder forfeits, first, any accumulated reserve; and, second, his right to continuing or future insurance. The statutes (of 1876, 1877, and 1892) merely operate upon the parties after the contract has been executed and delivered, and regulate the form or method of procedure of the company in carrying out its rights under the contract. It never has been pretended that the effect of any of these statutes is to absolve the policy-holder from the payment of premiums; and, indeed, in no just sense can it be said that, even with the protection of the statute, the policy-holder is otherwise than in default under his contract when he fails to pay his premium upon the day fixed. The scope, object, and effect of the statute is, merely as a governmental regulation and as a matter of public policy, to interpose an obstacle in the way of the company insisting upon its rights of forfeiture given by the terms of the contract until it shall have given the prescribed notice. This notice is additional to that which the policy-holder already has through the possession of his policy, whose terms prescribe the amount of premium due, the day upon which it falls due, and the place where it may be paid. This second and additional notice prescribed by the statute is secured to the policy-holder only by the statute, and there is no rule of common law which renders it necessary that the statutory notice or any similar notice should be given him before his contract with regard to forfeiture takes full force and effect. We have no case here like that of requiring process to be served before judgment can be taken in an action at law. This is not a question of due process of law. There is no necessity that the legislature should provide for the statutory

premium notice or any similar notice. It is a work of supererogation, an additional safeguard from motives of public policy thrown around the interests of the policy-holder, which in no sense becomes part of his contract, so that the legislature cannot subsequently to the making of the contract withdraw the provision for giving notice. In none of these cases have the parties imported the statute into the policy. The form of the contract evinces the intention of the parties to disregard the statute, to contract in spite of it, and to provide that the policy shall be forfeited if the premium be not paid upon the due date. The provision in the policy waiving any statutory notice of the due date of the premium, or any notice other than that contained in the policy itself, shows the intention of the parties to get away from the statutes as much as possible, and precludes any claim on the part of the policy-holder that he is not satisfied with a repeal of the statute as to his existing policy. Nor is this view changed by any language contained in the policy or application that they are subject to the laws of the State of New York and are to be construed by such laws. Of course, the policy must necessarily be subject to the laws of the State of New York, if it is a New York policy, and the statement in the application that it is so subject is nothing more than an expression of a legal fact and not of an intention on the part of the parties to make a contract in the terms of the statute. The premium-notice statutes are purely remedial. They are passed by the State in the exercise of its police power and of its right to protect the negligent, careless, and unbusinesslike from the disastrous effects of their unreasoning conduct. Such statutes have always been held to be repealable and to confer no vested right. They are passed from motives of public policy, with no regard for individual interests or the rights of any particular person, and are not considered as conferring rights upon any individual. The repeal of premium-notice statutes rests upon

the same basis as the repeal of any other law which has obstructed the carrying out of a contract morally valid but legally invalid. Such repealing statutes are not considered as impairing the obligation of a contract, but as removing an obstruction to the performance of a contract. The premium-notice statutes never touch the obligation of the contracts, but simply deal with the mode and method by which the company may proceed to forfeit the contract according to its terms. The only effect, therefore, that an amendment or repeal of a premium-notice statute has, is to leave the contract operative in a particular with respect to which it was formerly obstructed. These views have been accepted by the circuit court of the United States for the sixth district, both in the first instance and in the court of appeals, in the case of Rosenplanter *vs.* Provident Life and Savings Assurance Society of New York. Copies of the opinions of the court are annexed to our brief in the Cohen case. In the circuit court of the United States for the ninth district the general proposition with regard to the power of the legislature in this behalf is accepted in the case of Hathaway *vs.* The Mutual Life Insurance Company, a copy of which opinion is annexed to our brief in the Cohen case; but the Rosenplanter case is distinguished, as we think, fallaciously, as has been pointed out in our Cohen brief. The supreme court of the State of New York and the superior court of the State of California have also upheld the power of the legislature as here claimed.

It is well settled that the legislature can withdraw the defense of usury with respect to existing contracts. Retroactive effect is given to laws prohibiting the defense of usury, as such statutes are regarded rather as laws giving force and validity to the obligation of contracts than as impairing such obligation.

Wade on Retroactive Laws, secs. 240, 244, 245, and 246, and cases there cited.

It has been held that an act validating bank notes previously invalid was constitutional and impaired no vested right.

Bleakney *vs.* Farmers' and Mechanics' Bank, 17 Sergeant & Rawle, 64.

Hayes *vs.* Wurts, 4 Sergeant & Rawle, 356.

Trustees Cuyahoga Falls R'y Co. *vs.* McCaughney, 2 Ohio St., 52.

A remedial act permitting an unpaid tax to be paid so as to validate a void contract has been held to be valid.

Phœnix Ins. Co. *vs.* Pollard, 63 Mis., 641.

Remedial acts permitting stamping of unstamped instruments are valid.

Harris *vs.* Rutledge, 19 Ia., 388.

In this case the obligor in a contract claimed a vested right to avail himself of his own default in complying with the law requiring him to affix his stamp to the instrument executed by him. This seems a proposition only less shocking than those involved in these cases—that an insured after neglecting to comply with his contract for years can nevertheless, by reason of a technical omission to send an unnecessary and useless notice, mulct the company. The contract of insurance cannot be read over without a recognition of the moral obligation on the part of the insured not to claim anything under the policy unless he has punctually paid his premiums. That moral obligation renders it impossible that he should have any vested right in even a statutory regulation interposed from motives of public policy as an obstruction to the performance of his obligation. There was no moral wrong in the insured entering into the contracts in question; contrariwise, they were morally valid, and could be enforced according to their terms but for the obstructive effect of the

necessity of giving this notice. The insured certainly has no vested right in not performing his contract according to its terms, which, be it observed, was never declared by any statute to be invalid or in any sense prohibited by law. The giving of the notice provided for in these statutes is a mere remedy, and does not cease to be such because it is obstructive to the company and beneficial to the policy-holder. Remedies of necessity belong to the supreme power to prescribe, and their continuance is not the subject of contract between private parties.

Conkey *vs.* Hart, 14 N. Y., 30.
Curtis *vs.* Whitney, 13 Wall., 68.
Cooley on Const. Lim., 2d ed., 361, 362.

There is no good reason why legal impediments to the enforcement of contracts binding upon the conscience may not be removed.

New Orleans *vs.* Clarke, 95 U. S., 644.

That the provision in the policy that it be forfeited if the premiums be not paid upon the due dates is binding upon the conscience of the insured and is a moral obligation is made clear from a consideration of the character of a life-insurance policy. It is a wagering contract. The insurance company bets that the insured will die after the average age, and can make no money out of the transaction unless the insured so dies. The insured bets that he will live less than the average age, and gains nothing unless he so lives. Those who die under the average age are paid their losses by the gains from those who live beyond the average age, who, by their overpayments, produce the funds to pay the losses of those dying early. The scheme of life insurance is therefore totally deranged by a cessation of payment of premiums by an insured for a number of years, with a subsequent restoration of the policy, for the reason that, as the contract is unilateral and the insured cannot be com-

pelled to pay premiums, the matter takes this practical turn: That if the insured has an impaired life and sees that he will die under the average age he will pay up his premiums and have his policy restored; whereas, if he sees that he will live beyond the average age he will not pay up back premiums. This whole matter is most ably elucidated in the case of Statham *vs.* N. Y. Life Insurance Company, 93 U. S., 24. (See point IV, Phinney brief, p. 94.)

POINT VI.

The intention of the legislature in passing the statute of 1897 was to affect existing policies.

Existing policies were embraced in the word "hereafter," where the statute refers to policies "hereafter issued or renewed." This was a perpetuation of the former language and speaks as of the time of the passage of the act of 1876. The word "renewed" in this section in the act of 1899 means precisely what it was held to mean in the original act of 1876. It means an existing policy which is renewable or to be renewed or capable of being renewed by the payment of a premium after the first premium. It must be observed that this act of 1897 is in no sense limited to residents of the State of New York. It affects all policies and holds out to every policy-holder the opportunity of obtaining the benefits of its provisions, provided he has a post-office address within the State of New York. Non-residents, as well as residents, may have such an address. It is obvious that the statute of 1897 effects these results:

(1.) It absolutely repeals all provision as to notice to those who do not have post-office addresses in the State of New York, and as to them it gives power to the company to forfeit the policy within a year from any default when there has been no notice.

(2.) With regard to existing policies where a default has occurred prior to the taking effect of the act of 1897, it gives power to forfeit the policy at the expiration of a year from non-payment of premium, even if no notice has been sent.

(3.) As to policy-holders not having post-office addresses within the State, the company being under no necessity of sending them any notice, and upon showing the proof of notice to those having such addresses, it clearly has the right to forfeit the policy upon any default occurring after the taking effect of the act.

(4.) In any event and with respect to any policy it limits all right of action upon the policy to a year after any default in paying premium.

The Cohen and the Sears policies are clearly forfeited, because in each case the premium for the year preceding the act of 1897 was not paid and more than a year elapsed after such premium became due before the death of the insured. A premium became due after the act of 1897 took effect and was not paid, and no suit was brought upon the policy, either to restore it or to recover upon it, within a year from the non-payment of the premium that fell due after the act of 1897. It is not necessary to repeat here the arguments contained in the fourth point of the Cohen brief, but attention is respectfully requested to them in this connection. If our argument is well founded that the provision about bringing suits within a year is not a statute of limitation strictly, but a limitation upon the right granted by the statute to every policy-holder, then it was not necessary to plead the statute.

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